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No. 04-1170

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

MICHAEL LEE MARSH, II,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1) Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

2) Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. § 1257, as construed by *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975)?

3) Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision below invalidates Kansas' death penalty based upon a misinterpretation of the Eighth Amendment. The court held that the possibility that a jury may impose death when the aggravating and mitigating factors are equal is inconsistent with

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

this Court's Eighth Amendment jurisprudence. If upheld, this misinterpretation of the Constitution could threaten capital punishment in other states as well as Kansas. This erroneous interpretation frustrates the wishes of Kansas' citizens in seeing their moral priorities vindicated through the criminal justice system. In addition, it may lead to the loss of innocent lives. This threat to public safety and the integrity of a state's criminal justice system is contrary to the interests that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On June 17, 1996, Michael Lee Marsh, the defendant, murdered Marry Ane Pusch and her 19-month-old daughter, Marry Elizabeth Pusch (M.P.), in their home in Wichita, Kansas. *State* v. *Marsh*, 278 Kan. 520, 525, 102 P. 3d 445, 452 (2004). Marry was shot in the head and was stabbed in the heart. See *ibid.* The house was burned down. M.P. was severely burned and died six days later. See *id.*, at 525-526, 102 P. 3d, at 452. Marsh confessed to shooting Marry and abandoning M.P. after he fled the residence. See *id.*, at 526, 102 P. 3d, at 452. Marsh sought to submit circumstantial evidence tying Marry's husband to the crimes, but the trial court refused because the state's evidence against Marsh was direct. See *ibid.*

A jury convicted Marsh of the capital murder of M.P., first-degree murder of Marry, aggravated burglary, and aggravated arson, and the jury found three aggravating circumstances. *Id.*, at 527, 102 P. 3d, at 453; see Kan. Stat. Ann. §§ 21-4625(2), (5), (6). Marsh was sentenced to death for murdering M.P., life with a minimum term of 40 years for Marry's murder, 51 months for aggravated arson, and 34 months for aggravated burglary. See 278 Kan., at 525, 102 P. 3d, at 452.

While Marsh's appeal was pending, the Kansas Supreme Court decided that the Kansas death penalty statute as written could violate the Eighth Amendment, because it would allow

a death sentence to be imposed where the aggravating and mitigating factors were equal. See *State* v. *Kleypas*, 272 Kan. 894, 1015-1016, 40 P. 3d 139, 232 (2001). The *Kleypas* Court did not strike the Kansas death penalty law, but instead allowed trial courts to avoid this supposed defect through jury instructions that changed the wording of the statute. See *id.*, at 1018, 40 P. 3d, at 233-234.

In the present case, the majority reaffirmed the first holding of *Kleypas*, rejecting the dissenters' contention that this Court had resolved the question in *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584 (2002). See *Marsh*, 278 Kan., at 536-537, 102 P. 3d, at 458-459. The Kansas Supreme Court then went on to overrule the second holding of *Kleypas*. The court held that the Kansas death penalty law could not be construed to avoid the purported Eighth Amendment violation and struck down the state's death penalty. See *id.*, at 544, 102 P. 3d, at 464. The Kansas Supreme Court also reversed Marsh's conviction for murdering M.P., because the trial court erroneously excluded circumstantial evidence that tied the husband to the crimes. See *id.*, at 533, 102 P. 3d, at 456-457. It affirmed the convictions and sentence for aggravated burglary and the murder of Marry, but ordered a new trial on the capital murder and aggravated arson counts. *Id.*, at 548, 102 P. 3d, at 466. This Court granted certiorari on May 31, 2005, adding two jurisdictional questions, as described in Parts I and II, *infra*.

SUMMARY OF ARGUMENT

While the decision below does not fit the literal definition of final judgment, under *Cox Broadcasting Corp.* v. *Cohn*, there is a final judgment in the present case because the Eighth Amendment issue cannot be reviewed in the subsequent state proceedings. Kansas procedure effectively prevents the state from raising the Eighth Amendment issue upon Marsh's retrial. The fact that the Eighth Amendment question was not raised in

the state's brief in the Kansas Supreme Court does not change this analysis because the federal constitutional holding of the *Kleypas* decision was vigorously contested by the dissents and reaffirmed by the majority in the decision below.

The judgment in this case does not rest on independent state grounds. Since the state court did not decide the Eighth Amendment issue on procedural default grounds that doctrine does not apply. While the severability of a statute is a state-law issue, the invalidity of a part of the state law is a federal issue and is a prerequisite to the severability issue.

Kansas' equipoise provision does not violate the Eighth Amendment. While the Eighth Amendment requires individualized sentencing, this does not prevent a state from structuring how the jury considers the mitigating evidence. So long as the defendant can present his mitigating evidence and the sentencer considers it, the formula for decision is a matter of state law.

The decision below cannot be squared with this Court's precedents. First, it mistakes the sentencing phase for the trial on guilt even though they involve very different types of decisions. It also fails to recognize that placing a reasonable doubt burden on the prosecution for the ultimate sentencing question benefits capital defendants far more than any incidental harm from the equipoise provision. The equipoise provision would be constitutional even without the reasonable doubt requirement, as it is appropriate to make the defendant prove his case for mitigation after the state has proven beyond a reasonable doubt that he is eligible for capital punishment.

The continuing creation of new rules governing capital sentencing is causing more harm than good. The instability of the law causes arbitrary removal of murderers from death row for reasons having nothing to do with their culpability.

ARGUMENT

I. The decision in this case is final and draws in question the validity of a statute within the meaning of *Cox Broadcasting*.

In its order granting the petition for writ of certiorari, this Court directed briefing on two additional questions. The first is, "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. Sec. 1257, as construed by the *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975)?" *Cox Broadcasting* addressed two jurisdictional questions, the "drawn in question" requirement of former 28 U. S. C. § 1257(2) and the "final judgment" requirement of the same statute. The subsection involved in that case governed jurisdiction on appeal and has since been repealed. See Pub. L. 100-352, § 5, 102 Stat. 662 (1988). The two phrases at issue in *Cox Broadcasting* survive, however, in the present certiorari statute.

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ." 28 U. S. C. § 1257(a).

A. Final Judgment.

Under a literal interpretation of the word, the decision of the Kansas Supreme Court would not be a "final judgment" because the case is remanded for retrial of the capital murder charge. See *State* v. *Marsh*, 278 Kan. 520, 548, 102 P. 3d 445, 466 (2004). *Cox Broadcasting* did not take such a literal view, however. The Court identified four categories of cases in which judgments may be treated as final despite the fact that further proceedings are in order. See 420 U. S., at 477. The third is pertinent here.

"In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.*, at 481.

Cox Broadcasting cited as an example of this type the case of *California* v. *Stewart*, decided with *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The California Supreme Court had suppressed Stewart's confession on federal constitutional grounds and directed a retrial. See *id.*, at 498, and n. 71. If a retrial without the confession resulted in acquittal, the state would have no appeal, and hence the judgment was final for the purpose of this Court's review.

In the present case, a conviction on retrial would be followed by a sentence other than death. The state cannot appeal that sentence under Kansas law. The statute on criminal appeals provides for very limited appeals by the prosecution, none of which would apply to this situation. Kan. Stat. Ann. § 22-3602(b). Subdivision (b)(3) provides for appeals on a "question reserved," which in essence allows the prosecution to obtain an advisory opinion for future cases after "the case at hand has concluded . . . ." See *State* v. *Roderick*, 259 Kan. 107, 108, n. 1, 911 P. 2d 159, 161, n. 1 (1996). This procedure would not be available in this case because no unresolved question remains to be decided. The procedure is not available merely to have the state supreme court repeat what it has already said. See *State* v. *Holland*, 236 Kan. 840, 840, 696 P. 2d 401, 402 (1985). State law aside, review of the sentence in this Court may be precluded by the Double Jeopardy Clause as well. See *Bullington* v. *Missouri*, 451 U. S. 430 (1981).[2]

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2. In *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 111-112 (2003), a plurality indicated that *Bullington* should be limited to the death-eligibility determination, not the selection of sentence from the legally available range. However, the full Court has not yet gone that far, although *amicus* CJLF believes it should in an appropriate case. See *infra*, at 23.

The unavailability of review after remand distinguishes this case from *Johnson* v. *California*, 541 U. S. 428 (2004) (*per curiam*). In that case, the intermediate appellate court reversed a conviction on a *Batson*[3] claim without addressing other grounds. See *id.*, at 429. The state supreme court reversed on the *Batson* claim and remanded for decision of the other issues. See *ibid.* This situation "comes closest to fitting the third *Cox* category, but ultimately falls outside of it." *Id.*, at 430. Johnson could obtain review if his conviction were affirmed again on remand, *id.*, at 430-431, and ultimately he did. See *Johnson* v. *California*, 545 U. S. __, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). No such second-round review is available to the State in this case, so it qualifies for the third *Cox* category.

B. Drawn in Question.

The decision in the present case struck down the state's entire capital sentencing system on Eighth Amendment grounds. It would seem that the "drawn in question" element is easily met. However, in the Brief in Opposition, defendant Marsh puts great weight on the State's brief in the Kansas Supreme Court, in which the State did not challenge the precedent in *State* v. *Kleypas*, 272 Kan. 894, 40 P. 3d 139 (2001) that the "equipoise" provision was unconstitutional but severable. See Brief in Opposition 10; J. A. 40. Defendant relies on *Morrison* v. *Watson*, 154 U. S. 111, 115 (1894) for the proposition that when the state court applies an unchallenged precedent on the constitutionality of a statute, the requirement is not met. See Brief in Opposition 17-18.

Morrison is significantly different from the present case. In *Morrison*, the constitutionality of the statute was not questioned in the state court by the parties *or* by the court. Instead, "the construction and validity of the statute were treated as settled by the ruling in the earlier case . . . ." 154

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3. *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

U. S., at 115. In the present case, the state court *could* have treated the invalidity of the equipoise provision as settled by *Kleypas*, but it did not. The federal constitutional holding was vigorously challenged by the three dissenting Justices in a 4-3 decision. See *Marsh*, 278 Kan., at 548-564, 102 P. 3d, at 466-474 (Davis, J.); *id.*, at 564-576, 102 P. 3d, at 475-482 (Nuss, J.); *id.*, at 583, 102 P. 3d, at 486 (McFarland, C.J.). The state recognized *Kleypas* as precedent, but chose not to challenge it. See *id.*, at 535, 102 P. 3d, at 458. The majority did not rely on procedural default, but rather reaffirmed *Kleypas* "[a]fter full reconsideration." *Id.*, at 537, 102 P. 3d, at 459.

As defendant correctly notes, Brief in Opposition 15, *Illinois* v. *Gates*, 462 U. S. 213, 218 (1983) described the original 1789 rule in conjunctive terms: "no jurisdiction unless a federal question had been both raised and decided in the state court below." The modern rule, however, is disjunctive: "the so-called 'not pressed *or* passed upon below' rule." *Id.*, at 219 (emphasis added).

Cohen v. *Cowles Media Co.*, 501 U. S. 663, 667 (1991) makes this point with unmistakable clarity. "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and determined." This principle also distinguishes *Howell* v. *Mississippi*, 543 U. S. __, 160 L. Ed. 2d 873, 125 S. Ct. 856 (2005) (*per curiam*). In that case, the defendant raised only state-law grounds, *and* the court decided only state-law grounds. See *id.*, 160 L. Ed. 2d, at 876-877, 125 S. Ct., at 857.

The validity of the Kansas statute under the Eighth Amendment was "drawn in question," and the Kansas Supreme Court decided the question. Exactly how that question came before the state court is, as *Cohen* said, "irrelevant to this Court's jurisdiction."

II. The judgment in this case does not rest on independent state grounds.

In addition to the issues raised by the parties, the Court's order granting certiorari directed briefing on whether "the Kansas Supreme Court's judgment [was] adequately supported by a ground independent of federal law." There are several independent state ground arguments that conceivably could be made, including procedural default, the reversal of the underlying conviction, and severability. None of these is valid.

A. Procedural Default.

A failure to raise an argument at the proper time or abandonment of an argument made at an earlier stage can be an independent state ground. See *Baldwin* v. *Reese*, 541 U. S. 27, 30-31 (2004) (failure to reassert in state supreme court claim raised and decided in lower court); *Sochor* v. *Florida*, 504 U. S. 527, 534 (1992) (claim rejected on appeal because not raised at trial). However, the state-law default does not block federal jurisdiction if the state court decides the case on the merits and not on the default. "[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985). "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst* v. *Nunnemaker*, 501 U. S. 797, 801 (1991). As noted *supra*, at 8, the state court in the present case unambiguously redecided the equipoise question on the merits. Even if the decision were unclear, the doubt would be resolved in favor of jurisdiction, see *Caldwell*, *supra*, at 327, but the decision is perfectly clear. There is no alternative holding on procedural grounds as well as the merits. Cf. *Sochor supra*, at 533-534. The State's decision not to challenge *Kleypas* is merely noted at the top of the discussion and not mentioned again. See 278 Kan., at 535-537, 102 P. 3d, at 458-459. Under *Caldwell*, this

is not an independent state ground of the decision. It is not a ground of the decision at all.

B. Reversal of Conviction.

As noted *supra*, at 5, the state court reversed defendant's conviction of capital murder on grounds not questioned here. This is not an independent state ground supporting the judgment for much the same reasons it does not render the judgment nonfinal. The state court decision in this case did not merely reverse and remand for a new trial. It remanded for a new trial without the possibility of the death penalty upon reconviction. That aspect of the decision rests on federal law, and it is therefore reviewable in this Court, just as decisions suppressing evidence and remanding for trial without the evidence are reviewable. See *supra*, at 6.

C. The Severability Question.

Whether an invalid portion of a statute is severable from the remainder is a question of statutory interpretation. See *United States* v. *Booker*, 543 U. S. __, 125 L. Ed. 2d 738, 756, 160 S. Ct. 621, 651 (2005) (opinion of the Court by Breyer, J.). For a state statute, it is a matter of state law, see, *e.g.*, *Department of Treasury* v. *Fabe*, 508 U. S. 491, 509-510 (1993), and the decision of the state's highest court on that question is binding on all federal courts, including this Court. See, *e.g.*, *Johnson* v. *Fankell*, 520 U. S. 911, 916 (1997). However, a decision that the challenged portion really is invalid is a prerequisite to that state-law question, and where the challenge is based on the federal Constitution, that is a federal question. When a state court's decision on a question of state law is based on a federal law premise, this Court has jurisdiction to review the premise. See *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U. S. 138, 152 (1984).

Fox Film Corp. v. *Muller*, 296 U. S. 207 (1935) provides an informative contrast in a severability case. Because the

opinion is somewhat cryptic, it is necessary to refer to the state court opinion and the briefs to understand it.

In *United States* v. *Paramount Famous Lasky Corp.*, 34 F. 2d 984 (DC SDNY 1929), the District Court found the arbitration section of a standard film distribution contract, drafted by the distributors and imposed on the theatres, to be a violation of the Sherman Act. This Court affirmed in *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930).

Fox Film Corporation, a distributor, brought suit for damages for breach of one of these standard contracts against Muller. See 296 U. S., at 208. "Mr. Muller [was] lessee of the theatre in Maple Lake [Minnesota] and the village furniture dealer, undertaker and plumber." Brief for Respondent in *Fox Film Corp.* v. *Muller*, No. 47, Oct. Term 1935, p. 24. The illegality of the arbitration clause under federal law, having been decided by this Court, was not questioned by the parties or decided by the state court. See *Fox Film Corp.* v. *Muller*, 192 Minn. 212, 213-214, 255 N. W. 845, 845 (1934); 296 U. S., at 210.

In the portion of the opinion designated "1," the state supreme court reviewed the numerous and conflicting decisions regarding whether the invalid arbitration clause was severable or whether it tainted the entire contract with illegality. The court decided it was not severable. See 192 Minn., at 214-218, 255 N. W., at 846-848. In a shorter section designated "2," the state court held that recovery was precluded by this Court's decision in a federal antitrust case, *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909). See 192 Minn., at 218, 255 N. W., at 848.

In this Court, Fox Film contended that the Minnesota court's severability analysis was a misinterpretation of the District Court decision in *Paramount* (on a point not addressed in this Court's decision on appeal in *Paramount*) and erroneous under general severability law. Brief for Petitioner in *Fox Film*

Corp. v. *Muller*, No. 47, Oct. Term 1935, pp. 8-22. Fox Film further argued that federal antitrust law did not preclude recovery, challenging the state court's application of *Continental Wall Paper*. See *id.*, at 22-26.

This Court decided that it did not need to decide whether part 2 of the state court opinion decided a federal question. The severability holding was sufficient to sustain the judgment, and it was not federal. 296 U. S., at 209-210.

The critical distinction between *Fox Film* and the present case is that in *Fox Film* the illegality of the provision to be severed was no longer in issue. That question was "foreclosed" by the *Paramount* decision, *id.*, at 210, and not redecided by the state court. In the present case, that issue *was* redecided in full. See *supra*, at 8.

The decision of the Kansas Supreme Court that the "equipoise" provision is not severable, and that the entire statute must stand or fall with it, is a decision of state law. It is not reviewable in this Court. However, the decision that the entire statute falls rather than stands because the provision violates the Eighth Amendment is a decision of federal law which is within this Court's jurisdiction.

III. Kansas' equipoise provision does not violate the Eighth Amendment.

The Kansas Supreme Court invalidated its state's death penalty statute because it requires the sentencer to impose the death penalty when the aggravating and mitigating circumstances are in equipoise. See *State* v. *Marsh*, 278 Kan. 520, 535-536, 102 P. 3d 445, 458-459 (2004); *State* v. *Kleypas*, 272 Kan. 894, 1015-1016, 40 P. 3d 139, 232 (2001); Kan. Stat. Ann. § 21-4624(e). While this Court has paid considerable attention to capital punishment in the years since *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Eighth Amendment does not authorize judicial "micromanagement" of a state's capital

punishment system. See *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). There are limits to a court's Eighth Amendment authority over capital punishment, which the Kansas Supreme Court leapt over in this case. An understanding of these limits helps to illustrate why the Kansas Supreme Court's holding is incorrect, and demonstrates that a state can place limits on the defendant's efforts to obtain mercy without violating the Eighth Amendment.

A. Eighth Amendment Limits.

Although this Court's capital punishment jurisprudence is often more complex than clear, the general limits to judicial regulation of capital punishment have been succinctly summarized:

> "In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey* v. *Kemp*, 481 U. S. 279, 305-306 (1987).

Since the equipoise instruction has no bearing on the proportionality of Kansas' death penalty law or its eligibility requirements, the only relevant Eighth Amendment issue is whether this provision improperly prevents the jury from considering the relevant mitigating evidence. If the Kansas law does not conflict with this principle, then a court cannot invoke

the Eighth Amendment to invalidate the equipoise provision. If a state's death penalty system "narrows the class of death-eligible murderers and then at the penalty phase allows for the consideration of mitigating circumstances and the exercise of discretion," *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988), then it passes muster under the Eighth Amendment line of capital sentencing cases. "The Constitution requires no more." *Ibid.*

While the Eighth Amendment gives the capital defendant the right to present and have the jury consider mitigating evidence, this does not render the state powerless to regulate the jury's consideration of the evidence in the penalty phase of a capital case. In *Boyde* v. *California*, 494 U. S. 370 (1990), the defendant attacked a standard California jury instruction which told the jury that if the aggravating circumstances outweighed the mitigating circumstances then the jury "shall impose" death. *Id.*, at 374. He claimed that the " 'shall impose' language . . . precluded the jury from evaluating the 'absolute weight' of the aggravating circumstances and determining whether they justified the death penalty." *Id.*, at 376. Boyde also claimed that his language prevented the jury "from deciding whether, in light of all the aggravating and mitigating evidence, death was the appropriate penalty." *Ibid.* These arguments were rejected as inconsistent with the state's role in structuring capital punishment procedure. The jury does not have to be free to decline to impose death even if the aggravating circumstances outweigh the mitigating. See *id.*, at 377. The Eighth Amendment does not forbid the use of mandatory language like "shall" in death penalty instructions. Instead, this Court recognized that "there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " *Ibid.* (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion)).

Boyde applied *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), which endorsed legislative structuring of the capital jury's decision in similarly strong terms. Like *Boyde*, the *Blystone* decision upheld a state law mandating a death verdict from the jury in certain circumstances. The Pennsylvania law under attack in *Blystone* mandated a death verdict " 'if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury finds one or more aggravating circumstances which outweigh any mitigating circumstances.' " *Id.*, at 302 (quoting 42 Pa. Cons. Stat. § 9711(c)(1)(iv) (1988)). The rejection of that attack establishes a foundation for regulating the sentencing jury's decision in capital cases.

Blystone attacked the mandatory nature of the Pennsylvania law. A statute is unconstitutionally " 'mandatory' " when death is automatically imposed as in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) or *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). See 494 U. S., at 305. The statute in *Blystone* did not limit what types of mitigating evidence could be considered by the jury. See *ibid.* Under Pennsylvania law, death "is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances." *Ibid.*

If the jury is allowed to consider all of the relevant mitigating evidence, then the requirement for individualized sentencing is met. See *id.*, at 307-308. The mandatory instruction did not prevent the jury from considering any mitigating evidence offered by the defendant. See *ibid.* So long as a state's system is consistent with the two requirements explained in *McCleskey*, the State has the "traditional latitude to prescribe the method by which those who commit murder shall be punished." *Id.*, at 308-309.

Structuring the jury's decision is not inconsistent with the Eighth Amendment. Instead, the Eighth Amendment addresses real limits on the defendant's ability to present mitigating

evidence. A state law can be unconstitutional because a mandatory death sentence makes irrelevant any mitigating evidence regarding the particular defendant or circumstances of the crime. See *Sumner* v. *Shuman*, 483 U. S. 66, 78-79 (1987). The case that established the "all mitigation" rule involved an Ohio statute that recognized a relatively small set of mitigating circumstances, thus effectively excluding other mitigating evidence. See *Lockett* v. *Ohio*, 438 U. S. 586, 608 (1978) (plurality opinion). The decision that gave the *Lockett* plurality majority status involved a categorical limitation on the defendant's case for mitigation—a restriction that the sentencer could not consider the defendant's abusive family history. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 112-113, and n. 8 (1982).

Structure can go too far under certain circumstances. The Kansas Supreme Court relied on *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) to support its holding that the equipoise provision was unconstitutional. See *State* v. *Kleypas*, 272 Kan. 894, 1012-1013, 40 P. 3d 139, 229-231 (2001). *Penry* struck down a Texas death sentence because the special issues that framed Texas' death penalty inquiry did not, in the circumstances of that case, allow the jury to give proper mitigating consideration to Penry's mental retardation and childhood abuse without extra instructions from the trial court. See 492 U. S., at 328. What *Penry* shows is that simply allowing mitigating evidence to be presented to the jury may not satisfy the Eighth Amendment if the jury cannot give proper mitigating effect to that evidence. However, that holding must be read in the context of the unusual mechanics of Texas' death penalty scheme.

Rather than having the jury simply evaluate the aggravating and mitigating evidence, the Texas capital jury must answer three questions before deciding the sentence:

> " '(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.' " *Jurek* v. *Texas*, 428 U. S. 262, 269 (1976) (lead opinion) (quoting Tex. Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976)).

The key issue in Texas has been when its special questions allow the jury to consider relevant mitigating evidence. *Jurek* held that this system was not invalid even though it did not explicitly mention mitigating circumstances, because the future dangerousness question allowed the jury to consider mitigating evidence such as the defendant's age, record, and mental or emotional state. See *id.*, at 272-273 (lead opinion). In most cases, it did. See *Johnson* v. *Texas*, 509 U. S. 350, 369-370 (1993); *Franklin* v. *Lynaugh*, 487 U. S. 164, 179-180 (1988) (plurality); *id.*, at 188 (O'Connor, J., concurring in the judgment).

The problem in *Penry* was a particular application of Texas' unique procedure. Because the first special issue whether the killing was deliberate did not further define that term, the jury might not have been able to use Penry's mental retardation in mitigation in spite of the potential mitigating effects of retardation with respect to whether he had the capacity to kill deliberately. See *Penry*, 492 U. S., at 322. Further, the mental retardation and childhood abuse evidence in Penry's case indicated a greater likelihood of future dangerousness, providing no vehicle for its morally mitigating weight under the second question. See *id.*, at 323-324. In order to satisfy the Eighth Amendment, the special inquiries had to be supplemented in order to allow the jury to give mitigating effect to Penry's retardation and childhood abuse. See *id.*, at 328. Texas has since amended its statute to add a fourth issue. See *Penry* v. *Johnson*, 532 U. S. 782, 803 (2001).

Penry demonstrates that Texas' former system had the potential to skip over the mitigating effects of some evidence. This decision does not stand for any general rule against structuring the jury's inquiry, as demonstrated by the subsequently decided *Boyde* and *Blystone*. Since Marsh's jury was given very broad instructions to consider mitigating evidence, see J. A. 24-26, *Penry*'s relevance to the present case is at best minimal.

While the sentencer must be allowed to give effect to the mitigating evidence, see *Franklin* v. *Lynaugh*, 487 U. S., at 185 (O'Connor, J., concurring in the judgment), the State can still structure the sentencer's discretion to impose life or death. If the defendant is allowed to present mitigating evidence and the instructions do not keep the jury from giving mitigating effect to the evidence or mislead the jury with regard to its role in sentencing, see *Romano* v. *Oklahoma*, 512 U. S. 1, 10 (1994), then the State is free to structure its capital sentencing procedure.

B. Equipoise and the Eighth Amendment.

The Kansas Supreme Court's holding that the equipoise provision violates the Eighth Amendment cannot be squared with a fair reading of this Court's precedents. The holding is summarized best in one passage:

> "Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its 'reasoned moral response' to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a 'tie goes to the defendant' when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional." *Kleypas*, 272 Kan., at 1015-1016, 40 P. 3d, at 232.

This passage is riddled with errors. No decision of this Court has required a "unique standard" for determining whether to impose the death penalty. So long as there is acceptable narrowing of death-eligibility and the sentencer is allowed to make an individualized assessment of the case for imposing the death penalty on the defendant, the state may fashion its capital punishment procedure as it sees fit. See *supra*, at 14. Outside the general parameters of the narrowing and individualized sentencing lines of precedent, states are free to structure their capital punishment systems. See *Payne* v. *Tennessee*, 501 U. S. 808, 824-825 (1991).

The Kansas Supreme Court made an even greater mistake by failing to examine the equipoise provision in its proper context. Jury instructions can neither be read nor analyzed in a vacuum. "Our decisions repeatedly have cautioned that instructions must be evaluated not in isolation, but in the context of the entire charge." *Jones* v. *United States*, 527 U. S. 373, 391 (1999); see also *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). Although there is no Eighth Amendment problem with giving the "tie" to the prosecution, any residual difficulty with the Kansas law disappears when examined in the context of the state's entire capital sentencing scheme.

While Kansas law requires a death verdict if the aggravating and mitigating factors are equal, it also requires the prosecution to prove beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances. See Kan. Stat. Ann. §21-4624(e). J. A. 27. The *Kleypas* court quoted at length a Colorado Supreme Court opinion that distinguished *Boyde* and *Blystone* from Colorado's equipoise provision, because the laws in those cases allowed death to be imposed only if the aggravating circumstances outweighed the mitigating evidence. See 272 Kan., at 1005, 40

P. 3d, at 224-226 (quoting *People* v. *Young*, 814 P. 2d 834, 846 (Colo. 1991)).[4] While the Kansas law differs from the California law in this manner, viewed as a whole, it is more favorable for capital defendants than the system upheld in *Boyde*.

California law does not place this reasonable doubt standard on the prosecution. See *People* v. *Daniels*, 52 Cal. 3d 815, 886, 802 P. 2d 906, 945 (1991). Kansas' system disadvantages defendants relative to California's only when the case for aggravation and mitigation are absolutely equal in the eyes of the jury. Although it may be theoretically possible that a sentencing jury will view the cases for aggravation and mitigation to be exactly even, this event is highly unlikely in the real world. Juries are unlikely to make such a precise calculation of relative merit. Discretionary jury decisions are, in reality, largely beyond the control of instructions. See Higginbottom, Colloquy: Juries and the Death Penalty, 41 Case W. Res. L. Rev. 1047, 1051 (1991). The decision of the sentencing jury in a capital case is not the same type of decision as deciding between guilt and innocence. The capital sentencer's decision is more complex than that of the guilt phase jury's. The trial jury's decision has one central issue, whether the prosecution proves beyond a reasonable doubt that the defendant committed all of the elements of the crime, while " 'sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does.' " *Zant* v. *Stephens*, 462 U. S. 862, 902 (1983) (Rehnquist, J., concurring) (quoted with approval in *California* v. *Ramos*, 463 U. S. 992, 1008, n. 21 (1983)). The jury in the present case was instructed on three aggravating circumstances, seventeen

4. It is worth noting that the Colorado court, although discussing this Court's precedents, invoked the state and not federal Constitution, thereby precluding this Court's review of its conclusion. See *ibid.* Other states with "equipoise" statutes regularly reject attacks on them. See *DePasquale* v. *State*, 106 Nev. 843, 852, n. 10, 803 P. 2d 218, 223, n. 10 (1990); *Smith* v. *State*, 729 So. 2d 1191, 1225-1226 (Miss. 1998).

specified mitigating circumstances, and one catch-all mitigating circumstance. See J. A. 24-26. The chance that the jury would find all of this precisely evenly balanced is vanishingly small, particularly since it must make the decision beyond a reasonable doubt.

While the equipoise provision almost never harms the capital defendant, the reasonable doubt standard benefits Kansas capital defendants in every case. A defendant cannot be sentenced to death in Kansas unless the jury finds beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances. See Kan. Stat. Ann. § 21-4624(e). Reasonable doubt is only required by the Constitution for the facts necessary for a criminal conviction. In that context, it plays a primary role in reducing the risk of erroneous convictions and is a recognition of the criminal defendant's paramount interests of the accused in criminal cases. See *In re Winship*, 397 U. S. 358, 363 (1970). The reasonable doubt standard also " 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' " *Id.*, at 364. If a capital sentencing proceeding is not the same as a trial on guilt, the Constitution does not mandate the reasonable doubt standard for the sentencer's decision to impose life or death.[5] See, *e.g.*, *Oken* v. *State*, 378 Md. 179, 253-254, 835 A. 2d 1105, 1148 (2003), cert. denied, 541 U. S. 1017 (2004). By imposing this requirement, Kansas grants a real advantage to the capital defendant. If a criminal defendant without the benefit of the reasonable doubt standard at the guilt phase is at " 'a severe disadvantage,' " *id.*, at 363,

5. If a state makes an increase in an authorized punishment contingent on certain facts, other than a prior conviction, then those facts must be proven beyond a reasonable doubt to a jury. See *Ring* v. *Arizona*, 536 U. S. 584 (2002). The Kansas scheme does not present this problem since the eligibility factors must be proven beyond a reasonable doubt to a jury. See Kan. Stat. Ann. § 21-3439 (capital murder defined); *id.*, § 21-4624 (capital sentencing procedure). The present case only addresses what can be done to the weighing of factors that takes place after an eligibility finding.

then the Kansas capital defendant has a distinct advantage relative to his California counterpart at the sentencing proceeding.

While the reasonable doubt instruction makes the Kansas law more beneficial to the capital defendant than the system upheld in *Boyde*, the constitutionality of the Kansas law does not hinge on this factor. The Kansas provision does not prevent the defendant from presenting any mitigating evidence to the jury, nor does it tell the jury to give anything less than full effect to the mitigating evidence offered by the defense. It only structures the jury's decision in the extremely rare case where it determines that the aggravating and mitigating cases are equal. Before a Kansas defendant can get to this point, he must first be convicted of capital murder and the jury must find at least one aggravating circumstance.[6] In Kansas, capital murder is limited to an intentional or premeditated killing: (1) in the commission of a kidnapping for ransom, (2) "pursuant to a contract or agreement to kill," (3) by an inmate in jail or prison, (4) in the commission of or attempt of rape or criminal sodomy, (5) of a law enforcement officer, (6) of more than one person, or (7) of a child in the course of kidnapping to commit a sex offense. See Kan. Stat. Ann. § 21-3439. The aggravating factors also involve conduct or criminal record beyond the run-of-the-mine murder. See Kan. Stat. Ann. § 21-4625. Once the state has proven beyond reasonable doubt that the defendant has committed a crime making him eligible for the death penalty, the Eighth Amendment should not prohibit the state from requiring the defendant to prove that he deserves mercy.

In *Blystone*, this Court upheld a system that placed a burden of producing mitigating evidence on the defendant in some circumstances. While the system did not give the tie to the prosecution, it did mandate the death penalty if the prosecution

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6. Some states have two layers of "narrowing," even though the Constitution only requires one. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988). Kansas is one of them.

proved one aggravating circumstance and the jury found no mitigating circumstance. See 494 U. S., at 302. If the state proves one aggravating circumstance, then the burden effectively shifts to the defendant to prove a mitigating circumstance or suffer the death penalty. Although not analyzed as a burden shifting device, this procedure was upheld in *Blystone*. Since the statute in question, "does not limit the types of mitigating evidence which may be considered" and it did not automatically impose death "upon conviction for certain types of murder," the Pennsylvania law satisfied the individualized sentencing requirement. *Id.*, at 305. The Kansas law is no different in this respect and therefore should be treated similarly.

The *Kleypas* Court supported its decision with what it saw as the great similarity between a trial on guilt and the capital sentencing proceeding. See 272 Kan., at 1015, 40 P. 3d, at 232. While there is support for that proposition in the double jeopardy case of *Bullington* v. *Missouri*, 451 U. S. 430, 444 (1981), that similarity has no relevance to the present case. What matters here is not the relative " 'embarrassment, expense and ordeal' " of the penalty phase defendant to his guilt phase counterpart, see *id.*, at 445 (quoting *Green* v. *United States*, 355 U. S. 184, 187 (1957)), but the nature of the capital sentencer's decision. The decision between life and death is fundamentally different from the guilt versus innocence question. See *Ramos*, 463 U. S., at 1007.

While it makes sense to apply double jeopardy to the capital sentencer's decision when the decision involves the existence of an eligibility factor, *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 110-112 (2003) (plurality), it makes less sense with respect to the final sentencing decision made after the eligibility determination. In any event, the analogy to double jeopardy is too weak to support a new extension of the Eighth Amendment.

This Court implicitly upheld Arizona's equipoise provision in *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled on other

grounds, *Ring* v. *Arizona*, 536 U. S. 584. Petitioner addresses this point in detail, as have the dissenters in the Kansas Supreme Court. See Brief for Petitioner Part II-A; *State* v. *Marsh*, 278 Kan. 520, 559-560, 102 P. 3d 445, 470-472 (2004) (Davis, J., dissenting); *id.*, at 564-573, 102 P. 3d, at 475-480 (Nuss, J., dissenting). While the *Walton* majority is less than clear whether it is addressing the burden of proof on the ultimate weighing as distinct from the individual circumstances, see 497 U. S., at 649-651, the point was unambiguously raised by the dissent as a reason for the unconstitutionality of the Arizona capital punishment system that was under review in *Walton*. See *id.*, at 687 (Blackmun, J., dissenting) (making exactly the argument accepted by the state court in this case). Refusal to address an argument raised by the dissent or the party implicitly rejects that claim. See *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990). Whether the *Walton* majority opinion is interpreted to address the dissent's argument or not, it is still a rejection of that argument and a holding contrary to the state court decision in the present case.

By convicting him of capital murder, the state has already made its case that the defendant should be executed. At the sentencing hearing the capital defendant is not attempting to litigate a disputed point like a defendant accused of driving under the influence or a former patient seeking compensation for a doctor's alleged malpractice. The capital defendant is attempting to mitigate his culpability for committing the very worst type of crime. While the state must prove guilt beyond a reasonable doubt, it can place on the accused the burden of proving incompetence to stand trial, see *Medina* v. *California*, 505 U. S. 437, 450-451 (1992), or an affirmative defense to the crime. See *Martin* v. *Ohio*, 480 U. S. 228, 236 (1987); *Patterson* v. *New York*, 432 U. S. 197, 211 (1977). The Eighth Amendment, which does not even impose a reasonable doubt requirement on the decision to impose death, does not prevent the state from requiring the death-eligible defendant to prove his case for mitigation. The defendant went before the sentencing jury convicted of crimes such that he was constitutionally

eligible for the death penalty. Requiring one so culpable to prove that he should be spared does not offend the Eighth Amendment.

To restore capital punishment in Kansas, this Court need do little more than repeat what it said in *Harris* v. *Alabama*, 513 U. S. 504 (1995). "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors is constitutionally required.' " *Id.*, at 512 (quoting *Franklin*, 487 U. S., at 179). The question of whether to impose a death sentence or life sentence in the infinitesimal portion of the spectrum where aggravating factors equal mitigating factors is a question of state law. The decision of that question was well within the legitimate power of the state legislature.

IV. Constant churning of the rules causes arbitrariness in execution.

A. Consistency in Sentencing.

In *Furman* v. *Georgia*, 408 U. S. 238, 309-310 (1972) (concurring opinion), Justice Stewart noted that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Underlying *Furman* was a concern that the penalty was discriminatorily imposed on black defendants. See *Graham* v. *Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring). The dramatic post-*Furman* reduction of arbitrariness and bias in which defendants are *sentenced* to death is one of the great success stories of American law, and one that has gone nearly unnoticed. See Scheidegger, Smoke and Mirrors on Race and the Death Penalty, 4 Engage 42, 44 (2003), http://www.fed-soc.org/Publications/Engage/oct%2003.pdf. However, arbitrariness in which of these murderers are actually *executed* remains a scandal, and constant changing of the rules is a major contributing factor.

The best known study on race and sentencing is the Baldus study litigated in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987). This study was sponsored in substantial part by the NAACP Legal Defense and Educational Fund, see D. Baldus, G. Woodworth, & C. Pulaski, Equal Justice and the Death Penalty 44 (1990) (cited below as "Baldus"), an organization vehemently opposed to capital punishment. See *Graham*, 506 U. S., at 481 (Thomas, J., concurring). Baldus himself, by the time of McCleskey's habeas hearing at least, had developed "something of a partisan bias." *McCleskey* v. *Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984), aff'd in part, 753 F. 3d 877 (CA11 1985), aff'd in *McCleskey* v. *Kemp*, *supra*. To the extent this study supports the current system, an extent much greater than commonly appreciated, it is a kind of declaration against interest, carrying extra weight.

The study confirmed that the post-*Furman* reforms had made sentencing less arbitrary. See Baldus, *supra*, at 97. The pre-*Furman* system had indeed substantially discriminated against black defendants. *Id.*, at 147. The post-*Furman* data were very different. "What is most striking about these results is the *total absence* of any race-of-defendant effect." *Id.*, at 150 (emphasis added). This is a result worth celebrating. For any American institution to reduce the effect of race to the degree that a social scientist cannot find it, though he very much wants to, is a great achievement. The subsequent litigation concerned Baldus' claim to have found a race-of-the-victim effect. The District Court found the model that produced that claim to be "totally invalid for it contains no variable for strength of the evidence . . . ." 580 F. Supp., at 367. Models which do account for that entirely legitimate factor "*produce* no *statistically significant evidence that race plays a part in either* [the charging or sentencing] *decisions in the State of Georgia*." *Id.*, at 368 (emphasis in original).

A study of California cases by RAND Corporation, commissioned by the Attorney General, similarly found no evidence of discrimination. See Klein & Rolph, Relationship

of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33 (1991). A special master appointed by the New Jersey Supreme Court, a tribunal quite hostile to the death penalty, found the same. D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), http://www.judiciary.state.nj.us/baime/baimereport.pdf. The much-ballyhooed "disparity" between the demographics of federal death row and the general population turns out to reflect the demographics of drug gangs, and not racial bias. U. S. Dept. of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 1 (2001).

Yet another study was commissioned by the Legislature of Nebraska and headed again by Baldus. This study again found no bias on race of either the defendant or the victim. D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, Executive Summary 14-22 (2001).

A recent, major study in Maryland, again conducted by an opponent of capital punishment, "*found no evidence that the race of the defendant matters in the processing of capital cases in the state*." R. Paternoster, *et al.*, An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction, Executive Summary 26 (2003) (emphasis in original), http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf. An apparent "race of victim" effect in statewide data disappeared into the statistical grass when analyzed separately by county. *Id.*, at 32. There are fewer death sentences in black-victim cases simply because more black victims live in urban counties, where the people elect prosecutors who seek the death penalty less often and where they form juries who impose it less often. This so-called "geographic disparity" is, in fact, local democracy and jury of the vicinage, operating as designed. See Scheidegger, 4 Engage, at 45. In short, the dramatic reduction of the arbitrari-

ness and bias of the pre-*Furman* era regarding those sentenced to death is a mission accomplished.

B. Arbitrariness in Execution.

Regrettably, the same cannot be said for the actual execution of those sentences. At the end of the year 2003, there were 3,374 murderers on death row, but only 65 sentences were carried out that year. See U. S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 2003, p. 1 (2004). In the same year, 96 persons were removed from death row because their sentences had been overturned judicially. *Id.*, at 9.[7] Protracted delays and large percentages of reversals result in very few of the sentences actually being carried out.

Regrettably, there is no good, comprehensive research on the reasons for high reversal rates.[8] Those of us who have worked long in the field know qualitatively, if not quantitatively, that changes in the rules are a major part of the problem.

To illustrate, let us consider three hypothetical murderers of equal culpability, A, B, and C, tried and sentenced to death in the State of Maryland. In that state, a standard jury instruction on mitigating circumstance was crafted by the state's advisory committee on rules and promulgated as a rule by the state's highest court. However, in *Mills* v. *Maryland*, 486 U. S. 367 (1988), this Court declared the standard instruction invalid, based on the possibility it might be misconstrued by a jury giving it a strained interpretation. See *id.*, at 393 (Rehnquist, C. J., dissenting). *Mills* created a new rule of law, not required by this Court's precedents up to that time, and that rule was not

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7. Total removals from death row were an anomalously high 257 in this year because of the controversial mass commutation by the Governor of Illinois. See *id.*, at 8-9.

8. There is some bad research. See "Error Rate" Study is Riddled with Errors of Its Own, in California District Attorneys Association, Prosecutors' Perspective on California's Death Penalty 40-44 (2003), http://www.cdaa.org/WhitePapers/DPPaper.pdf.

essential to the fundamental fairness of the proceeding. See *Beard* v. *Banks*, 542 U. S. 406 (2004).

Our first hypothetical murderer, A, goes all the way through the system before *Mills* is decided, and A is executed. B's case is tried before *Mills* but decided on appeal afterward, and the sentence is reversed. An overloaded prosecutor's office presented with a stale, years-old case decides not to seek the death penalty again, and B escapes his just punishment. C is tried after *Mills* and the judge uses a different verdict form. His case is affirmed, and he is executed.

These different results come not from different culpability but merely from the fortuity of timing relative to the disapproval of a previously accepted practice and creation of a new rule. If the practice in question really is fundamentally unfair, then such disparate treatment may be a price worth paying. *Furman* itself, despite the massive disruption it caused, was worth the price. As time goes on, though, fewer and fewer new rules are even arguably so fundamentally unfair. See *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001).

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases, this Court established the broad outlines of what is required to fix the *Furman* problem: narrowing of the eligible class and consideration of mitigating circumstances. In *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988), this Court said, "The Constitution requires no more." Yet the Court has required more, going over standard jury instructions with a nit comb in cases such as *Mills* and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), producing arbitrary reversals in bulk by disapproving statutes and standard instructions which complied with all of this Court's requirements as of the time they were drafted.

In the fight against arbitrariness in capital punishment, the Court might well quote Walt Kelly's Pogo, "We have met the enemy, and he is us." J. Bartlett, Familiar Quotations 455, n. 1 (15th ed. 1980). Constant tinkering with the rules causes more arbitrariness than it cures. It is high time to put a stop to it. If

the state's sentencing system complies with the broad outlines of *Gregg*, and if the punishment is valid for the crime and the defendant, the Eighth Amendment inquiry should end. The details of sentencing procedure and jury instructions should be considered matters of state law, within the control of the people's elected representatives. Indeed, the creation out of whole cloth of restrictions that are not really in the Constitution is itself a violation of a constitutional right. The people of each state have the constitutional right to exercise all governmental powers neither forbidden by the Constitution nor yielded to the federal government. See U. S. Const., Amdt. 10.

The statute enacted by the representatives of the people of Kansas was not contrary to any of this Court's precedents when it was enacted, and there is nothing fundamentally unfair about it. By creating a new federal constitutional rule out of blue sky, the Kansas Supreme Court arbitrarily removed a group of murderers from death row without any regard for whether their sentences are deserved. This is more arbitrary and more unjust than any of the practices disapproved in *Mills*, *Penry*, or *Kelly* v. *South Carolina*, 534 U. S. 246 (2002), to name just a few. This decision must not stand.

CONCLUSION

The decision of the Kansas Supreme Court should be reversed.

August, 2005

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL L. MARSH II,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Kansas

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INTERESTS OF *AMICUS CURIAE*[1]

Amici are professors who teach at the two law schools located in the State of Kansas who support the Kansas Supreme Court's conclusion that the unique Kansas death penalty sentencing scheme, by forcing uncertain jurors to impose the death penalty, violates the United States Constitution.

Amici believe that the Kansas Supreme Court appropriately discharged its obligation as the final arbiter of Kansas law and a primary enforcer of the federal Constitution within the State of Kansas. The criticism of the Court by the State's lawyers in the Brief for Petitioner, and by the lawyers for *amici* state of Arizona, et al., and the Criminal Justice Legal Foundation, fails, in our view, to accept the unique role given to each state court to interpret its own statutes. We believe that the Kansas Supreme Court has the power to conclude that its own statute operates differently from the statutes of the *amici* states; it functions in a manner which deprives defendants of individualized consideration in capital sentencing trials by failing to "allow the jury to express its 'reasoned moral response' to the mitigating circumstances." *State v. Kleypas*, 40 P.3d 139, 231 (Kan. 2001).

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[1] This brief was written entirely by *amicus* and their counsel, with substantial assistance from the following students from Washburn University School of Law: Chad Barnhart, Andrew Hartnett, Joni Johnson, Daniel Keenan, Luanne Leeds, Roy Mozingo, Sabrina Sullivan, Angela Weatherford, and Jenny Williams. No contributions were made to the preparation or submission of this brief by any party or from any outside source. The views expressed in this brief are those of the individual professors, whose signing does not reflect the official views of the institution. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

In *State v. Kleypas*, the Kansas Supreme Court issued an exhaustive opinion examining the constitutionality of its recently enacted death penalty statute, under which the defendant is sentenced to death or to life imprisonment without parole for twenty-five years or forty years based solely on the following formula:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law.

K.S.A. § 21-4624(e).[2] Although the statute requires the Kansas Supreme Court to set aside a death sentence if it finds that "the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor," K.S.A. § 21-4627(c)(1), neither the trial court nor the Kansas Supreme Court has the power to independently re-weigh aggravating and mitigating factors or to review the sentence for proportionality. *See State v. Kleypas*, 40 P.3d at 239-41. The statute is identical in material respects to the capital punishment statute which Kansas' neighboring state of Colorado had found unconstitutional

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[2] The Kansas Legislature "rejected [the] suggestion of the attorney general [that the statute is unconstitutional] and adopted our present statute," in spite of the fact that no other jurisdiction in the United States deprives hesitant jurors of any and all power to impose a life sentence in a capital case. A-51.

In its brief in response to Marsh's argument, the state "concede[d] that under *State v. Kleypas* defendant's death sentence must be vacated and his case remanded for resentencing under K.S.A. § 21-4624(e) as construed by this Court. . . . [b]ecause defendant's death sentence was imposed as a result of the same *unconstitutional* application of K.S.A. § 21-4624(e) as occurred in *Kleypas*." A-40 (emphasis added). Similarly, the state conceded that the verdict forms submitted to the jury were erroneous and required reversal of Marsh's death sentence. A-44.[6]

In its opinion issued December 17, 2004, the Kansas Supreme Court adhered to its earlier, unchallenged opinion in *Kleypas* finding the statute unconstitutional. However, the court agreed with Marsh's counsel, and with Judge Davis' dissenting opinion in *Kleypas*, that the court had "erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature." *State v. Marsh*, 102 P.3d 445, 461 (Kan. 2004). The court vacated the portion of *Kleypas* which created a new tie-goes-to-life sentencing formula, stating:

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[6] The verdict forms gave the jury only two alternative choices:

(a) Finding beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, and sentencing the defendant to death; or

(b) Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances and sentencing the defendant to life imprisonment with parole eligibility set by the court at either twenty-five years or forty years.

A-27. No instruction required the jury to determine whether death was the appropriate punishment.

punishment. *State v. Kleypas*, 40 P.3d at 231. Since the Kansas Supreme Court is the final authority on questions of Kansas law, this Court and the parties must accept that court's interpretation of its own statute. Similarly, when the Kansas Supreme Court compares its own statute to the statutes of other states, and concludes that its own statute operates differently, that holding is also entitled to great deference, as the Kansas Supreme Court is "the ultimate expositor[ ] of [its own] state law," and "[this Court is] bound by their constructions except in extreme circumstances not present here." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (citations omitted); *see also, e.g.*, *Reitman v. Mulkey*, 387 U.S. 369 (1967). Thus, the conclusion of the Kansas Supreme Court that its statute deprives capital defendants of reliable, individualized consideration, and precludes doubtful jurors from effectual consideration of mitigating evidence in a close case is a fixed starting point for any constitutional analysis of the issue.

This Court's Eighth Amendment jurisprudence has made it abundantly clear that a constitutional death penalty scheme must give individualized consideration to each defendant, and further that a capital sentencing scheme cannot preclude a juror from giving effect to mitigating circumstances and evidence. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Kansas Supreme Court correctly found that K.S.A. § 21-4624(e) violates the Eighth Amendment because its sentencing formula, which operates like none other in the United States, requires jurors to impose a sentence of death if the weighing of mitigating and aggravating circumstances yields inconclusive results.

death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

1. There is no sound basis for rejecting the Kansas Supreme Court's interpretation of its own law.

The starting point for any constitutional analysis is the mechanical operation of the Kansas capital sentencing statute. On that question, there is no room to quibble with the decision of the Kansas Supreme Court that the statute operates to compel doubtful jurors to impose a sentence of death. This Court "repeatedly has held that *state courts are the ultimate expositors of state law*, . . . and that we are bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. at 691 (emphasis added), *citing Murdock v. City of Memphis*, 20 Wall. 590 (1875); *Winters v. New York*, 333 U.S. 507 (1948). A state court's ruling "should [be] bind[ing] unless so unfair and unreasonable in its application to those *asserting* a federal right as to obstruct it." *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (emphasis added). Therefore, this Court "accept[s] as binding the [Kansas Supreme] Court's construction of state homicide law." *Mullaney v. Wilbur*, 421 U.S. at 691. The holding of the Kansas Supreme Court as to the operation of its statute, including its determination that K.S.A. § 21-4624(e) precludes a jury in "doubtful cases" from giving meaningful consideration to the individual circumstances of the accused, *State v. Kleypas*, 40 P.3d at 231-32, is therefore entitled to substantial deference. "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

> rejected Kleypas' argument. The State's argument is premised on its view that the Arizona statute "is functionally indistinguishable from the Kansas statute in this respect." We disagree and find the two statutes distinguishable. The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before this court. Such a weighing equation results in mandating a death sentence where the jury finds equipoise as to the mitigating and aggravating circumstances.

State v. Kleypas, 40 P.3d at 226. The Kansas Supreme Court engaged in a detailed explanation of the sentencing mechanics of each statute, and demonstrated how each is functionally very different from the other. 40 P.3d at 228.[6]

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[6] The State court noted that the statute at issue in *Walton v. Arizona* was identical to Montana's, in that it requires a sentencer who finds one or more aggravating factors to impose the death penalty if "there are no mitigating circumstances sufficiently substantial to call for leniency." *State v. Kleypas*, 40 P.3d at 227, *quoting* Mont. Code Ann. § 46-18-305 (1977). The Montana Supreme Court found that its statute "does not require the death sentence to be imposed if the aggravating and mitigating factors are of equal weight." *Id.*, *quoting Montana v. Smith*, 863 P.2d at 1012. The Kansas Supreme Court observed:

> If a sentencer in Arizona thought aggravating and mitigating circumstances were equally balanced, he or she could reasonably conclude that there were mitigating circumstances 'sufficiently substantial to call for leniency,' *or* he or she could reach the opposite conclusion. The law leaves the sentencer free to decide either way. In contrast, a Kansas juror who reached the same conclusion about the relative balance between aggravation and mitigation would have only one option: to impose death. In fact, under the Arizona scheme a sentencer who thought that aggravating

(Continued on following page)

sister states, that Kansas law materially differs from all other, constitutional sentencing schemes. In a similar dispute over the interpretation of an Idaho statute with a similar federal counterpart, this Court observed, "Even if the . . . statutes contained identical language – and they do not – the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state. As discussed in more detail below, the judgment of the Kansas Supreme Court rests on a finding that the Kansas capital sentencing statute mandates that an undecided jury return a verdict of death, resulting in an inherently unreliable sentencing scheme that deprives a defendant of individualized consideration in the assessment of punishment. Petitioner and its *amici* present this Court with "no persuasive considerations indicating that these judgments should be overturned." *Reitman v. Mulkey*, 387 U.S. at 381. To the contrary, the decision of the Kansas Supreme Court reflects a faithful commitment to its "constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976).

mitigating circumstances]." *Id.* at 226, *quoting Hulsey v. Sargent*, 868 F. Supp. 1090, 1101 (E.D. Ark. 1993). The Kansas Supreme Court found that requiring a juror in such a state of indecision to impose a sentence of death violates the constitutional mandate for "reliability in the determination that death is the appropriate punishment in a specific case." 40 P.3d at 231, *quoting Woodson*, 428 U.S. at 305. Therefore, a sentence of death rendered in accordance with the statute is not a definitive determination by a jury that the defendant deserves the death penalty, only that there may or may not be doubt as to that question. That fact sets the Kansas scheme apart from every other capital sentencing scheme in the nation.

Petitioner and its *amici* also misconstrue the scope of the ruling of the Kansas Supreme Court by failing to read *Kleypas* and *Marsh* together. It is true that in *Kleypas* the Kansas Supreme Court, consistent with the recommendation of the Kansas Attorney General, adopted a sentencing formula requiring the jury to impose a sentence of death only if it finds that "aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist." *State v. Kleypas*, 40 P.3d at 234.[12] However, that portion of its opinion was vacated in *Marsh*, which held that the State's highest court "lacks legislative power to

[12] It is important to note that the sentencing formula legislated by the Court in *Kleypas* is identical to the one found constitutional by this Court in *Blystone v. Pennsylvania*, 494 U.S. 299, and *Boyde v. California*, 494 U.S. 370, in which the death penalty is required if aggravating circumstances outweigh mitigating circumstances. Thus, the argument of Petitioner and *amici* supporting petitioner that the Kansas Supreme Court's decision conflicts with *Blystone* and *Boyde* is clearly wrong. To the contrary, the *Kleypas* decision is in perfect harmony with them.

the *Kleypas* and *Marsh* cases used the very same language at issue to persuade the jury to impose the death penalty. In Mr. Marsh's penalty trial, the prosecutor told the jury in closing argument that "only if those mitigating circumstances outweigh the aggravating circumstances that you know are there, only then may [they] be considered because . . . the Judge has told you that the law says that if the aggravating circumstances are not outweighed by mitigating circumstances, you shall return a verdict of death." Record, Vol. 54 at 54-55. In the *Kleypas* case, the prosecutor emphasized to the jury that it *must* impose death even if the mitigating circumstances were as persuasive as the aggravating circumstances. A-61. Thus, the concerns of the Kansas Supreme Court were not remote possibilities, but would likely come into play in any case in which there is substantial mitigation.

The Kansas Supreme Court was right to be concerned that the language of K.S.A. § 21-4624(e) is an open invitation to the jury to abdicate its responsibility – to make a decision by avoiding a decision, and that defendants would thereby be "deprived of the precision that individualized consideration demands" under the Eighth Amendment. *Stringer v. Black*, 503 U.S. at 231.[14] Indeed, the statutory

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[14] Studies conducted by the Capital Jury Project have confirmed that jurors faced with the responsibility for deciding a capital case often seek "ways to deny their personal moral responsibility for the sentencing decision." Joseph L. Hoffman, *The Capital Jury Project: Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1157 (1995). Structured post-trial interviews with capital sentencing jurors show that they are "predisposed to use almost any available information to downplay their responsibility for the sentencing decision-including information that accurately describes the sentencing process." *Id.* at 1138.

weighing formula gives the prosecution powerful ammunition for neutralizing persuasive mitigation. The prosecutor in *Kleypas* explained the instructions to the jury as follows:

> If the aggravators are not outweighed by the mitigators, you shall impose the death penalty. *Not that you may, not that you can*, but that you *shall* impose the death penalty and this is the duty that you have sworn to uphold, shows command, *it means must*.

State v. Kleypas, Record on Appeal, Vol. 71, p. 26 (emphasis added). Referring repeatedly to the statutory formula, the prosecutor rhetorically asked the jury, "Does [Gary Kleypas' schizophrenia] lessen what he did, could that possibly outweigh what he did to Carrie Williams[?]" *Id.* at 52. The prosecutor concluded his discussion of aggravating and mitigating circumstances by telling the jury that the mitigating circumstances "do not outweigh the aggravators combined," *id.* at 62, and told them to "envision that scale that we talked about on voir dire. If you put the aggravators on one side, and the mitigators on the other side, those mitigators have to outweigh the aggravators. And in this case, when they do not, you are told what your duty is, you shall impose the death penalty." *Id.* at 63. The prosecutor concluded by acknowledging that the jury faced a hard choice, but reminded them of the mandatory nature of the death penalty, and used a posterboard of the weighing formula to drive home his point that a tough choice inevitably means death. *Id.* at 67.

The Kansas Supreme Court therefore decided this issue in a case that involved substantial mitigating factors as well as substantial aggravating factors, where the jury could reasonably interpret the instructions to mean that

the mere difficulty of choosing between aggravating and mitigating factors mandates a sentence of death. Any jury conscientiously following these instructions would agree that their inability to make a decision requires them to join in a verdict of death, even if they would rather express their findings of mitigation with a life sentence. This is contrary to the core philosophy of this Court's Eighth Amendment jurisprudence:

> A fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Zant v. Stephens, 462 U.S. at 874, *quoting Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). In finding that the sentencing equation of K.S.A. § 21-4624(e) violates the Eighth Amendment, the Kansas Supreme Court was fulfilling its duty "[in] capital cases [to] see to it that the jury has rendered its decision with meticulous care." *Godfrey v. Georgia*, 446 U.S. at 443 (Burger, C. J., dissenting). Petitioner fails to present any "persuasive considerations indicating that [this] judgment[] should be overturned." *Reitman v. Mulkey*, 387 U.S. at 381.

A statute which forces undecided jurors to impose a sentence of death in spite of substantial mitigating evidence fails to accord individual defendants the fundamental respect for human dignity that is embodied in the Eighth Amendment, and "treats all persons convicted of [murder] not as uniquely individual human beings, but as

members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. at 304. The Kansas Supreme Court properly held that such a statute is simply inconsistent with this Court's repeated admonition, in many contexts, of "the 'acute need' for reliable decision-making when the death penalty is at issue." *Deck v. Missouri*, ___ U.S. ___, 125 S. Ct. 2007, 2014 (2005). The decision of the Kansas Supreme Court that K.S.A. § 21-4624(e) violates the Eighth Amendment finds ample support in this Court's jurisprudence.

CONCLUSION

The decision of the Kansas Supreme Court should be affirmed.

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